

A Rustimah bt Buyong & Anor v Lembaga Industri Getah

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO KK-21-10 OF
2010

B CHEW SOO HO J
21 FEBRUARY 2013

C *Civil Procedure — Jurisdiction — High Court — Claim for native customary rights — Land application submitted for state land — Whether plaintiff conferred right over disputed land — Whether plaintiffs failed to comply with statutory provisions of Land Ordinance — Whether claim must be struck out because High Court had no original jurisdiction to determine or decide such claim — Quicquid plantatur solo credit solo*

D

Land Law — Customary land — Claim of — Disputed land — Land application submitted for state land — Whether conferred right over disputed land — Whether plaintiffs lawful occupant of disputed land — Whether plaintiff's claim established — Whether defendant's entry into disputed land lawful — Whether development carried out by defendant in disputed land lawful — Whether plaintiffs entitled to damages for loss of or destruction to oil palm trees planted by plaintiffs in disputed land — Whether statutory provisions of Land Ordinance complied — Sabah Land Ordinance (Cap 68) ss 14, 65, 66, 67(2) & 81

F

The plaintiffs alleged that they were the natives and the descendants of the indigenous Rungus people in Sabah and were at all material times the lawful occupiers, applicants and/or claimants of native customary rights ('NCR') of the state land in the locality of Kg Rukom Ulu in the District of Pitas, Sabah of an area of 100 acres more or less ('the disputed lands'). Further, the plaintiff alleged that they had been in occupation of the disputed lands since 1970 and have cultivated oil palm trees thereon with the knowledge and consent of the Lands and Surveys Department, Pitas. Sometime in September 2003, the plaintiffs had submitted their applications for state land and paid the registration fee. As they were in continuous occupation and cultivation of the disputed land for more than three years, the plaintiffs claimed that they had the NCR by virtue of ss 65, 66 and 67(2) of the Sabah Land Ordinance (Cap 68), ('the Land Ordinance'). The plaintiffs contended that the defendant had wrongfully trespassed onto the disputed land and caused damage and destruction to their rubber trees and oil palm trees thereby depriving them of the use and enjoyment of the disputed land. Hence, the plaintiffs sought from this court, inter alia, declarations that they have acquired NCR pursuant to ss 65, 66 and 67(2) of the Land Ordinance and that they are not affected by any purported alienation, issuance and registration of titles to other applicants of

G

H

I

the disputed land, an injunction to restrain the defendant from trespassing the disputed land and damages. The defendant averred that the land granted to them for rubber trees cultivation ('the said land') inclusive of the disputed land was still *gazetted* as a forest reserve in favour of Sabah Forest Development Authority ('SAFODA') in 2003 and 2004 and was not available for alienation at the material time. The defendant denied that the plaintiffs had established their claims of NCR under the Land Ordinance or alternatively defendant pleaded that the plaintiffs had no cause of action against the defendant in the High Court as the High Court did not have the original jurisdiction over the plaintiffs' claim of NCR under the Land Ordinance. The following issues were raised for the determination of this court namely, (a) whether the plaintiffs were in lawful occupation of the disputed land; (b) whether the defendant's entry into the disputed land was lawful; (c) whether the development, works and planting of rubber trees carried out by the defendant in the disputed land was lawful; and (d) whether the plaintiffs were entitled to claim damages against the defendant for the loss of or destruction to the oil palm trees planted by the plaintiffs in the disputed land and other damage to the disputed land as a result of the development, works and the planting of rubber trees carried out by the defendant in the disputed land.

Held, dismissing the plaintiffs' claim with costs of RM8,000:

- (1) It was unequivocal that there was no evidence to show that the plaintiffs had put up their NCR claim under s 14 or customary tenure under s 81 of the Land Ordinance to the ACLR or that the ACLR had considered and decided on such claim against them. What the plaintiffs had contended, was that they had applied for the disputed land and paid the registration fee for their respective applications. But nowhere did they say that they had forwarded their NCR claim or customary tenure claim to the Assistant Collector for Land Revenue ('ACLR') for determination under ss 14 or 81 of the Land Ordinance and decision under ss 16 or 82 and 83 of the Land Ordinance. Since the Land Ordinance has provided specific provisions vesting in the ACLR the authority to determine and/or decide the NCR or customary tenure claim over state land, the plaintiffs were not permitted to circumvent the provisions of the Land Ordinance to come to the High Court which has only the appellate jurisdiction to ventilate such claims. It is also axiomatic that any NCR claim has to be directed to the ACLR and/or the Director of Lands and Surveys and/or the government of the State of Sabah who must be made a party to the writ and be entitled to be heard. It was apparent here that they were not made by the parties herein (see para 10).
- (2) On the failure of the plaintiffs to comply with the statutory provisions of the Land Ordinance alone, their claim for NCR or customary tenure must be struck out on ground that the High Court has no original jurisdiction to determine or decide on such claim as decided by the Court

- A of Appeal in *Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors* [2011] 1 LNS 537. Consequently, in the absence of such right being determined over the disputed land, there could not be any question of trespass as the disputed land belongs to the state and not the plaintiffs.
- B *Quicquid plantatur solo credit solo* — everything planted in the soil belongs to the soil. Any vegetation or oil palm trees allegedly planted by the plaintiffs on the disputed land would not belong to the plaintiffs to entitle them to claim loss or damage caused to those plants. They belong to the land which was state land and thus to the state (see para 11).
- C (3) The mere submission of a land application for state land did not confer any right over the disputed land. The fact of the ACLR, Pitas having no objection to the plaintiffs' entry into the disputed land as alleged but with the risk and responsibility that the plaintiffs would have to bear themselves, was only indicative that their entry could not be lawfully
- D granted and that was why it was qualified and not absolute. There was no evidence or any averment by the plaintiffs that they were unaware that they were to bear such risks. Therefore, the reasonable inference that could be drawn was that the plaintiffs must have been well aware of such risks to enter into possession of the disputed land and if indeed they had
- E entered into, as stated expressly by PW3, that could not be construed to be that they have the right of possession thereof. Hence, the plaintiffs could not be in lawful occupation of the disputed land relying on the alleged consent or approval vide a letter from the ACLR (see para 16).
- F (4) The defendant's entry into the land inclusive the disputed land was premised on the letter from the permanent secretary of the Ministry of Agriculture and Food Industry which defendant submitted to be clear evidence that permission had been granted by the state government to the
- G defendant to enter the land. Ensuing from this letter the Cabinet of the State Government of Sabah had agreed to approve approximately 10,000 hectares of land at Semenanjung Bengkoka, District of Pitas to the defendant for its said poverty eradication project where approximately 14,460 hectares of the aforesaid forest reserved land were de-gazetted vide
- H *Gazette* Notification dated March 2004 for the land to be given to the defendant for its said project following which permissions were given by the Lands and Surveys Department for the defendant's surveyor to survey the land awarded to the defendant. All these actions indicated unequivocally that the land including the disputed land was intended to be given to the defendant for the stated purpose. In the absence of any
- I rebuttal evidence or evidence to the contrary, the defendant's entry into the said land was with the permission from the Sabah State Government through the Ministry of Agriculture and Food Industry (see para 18).
- (5) Following this, the development, works and the planting of the rubber trees carried out by the defendant in the land was undoubtedly lawful as

the approval was given to them by the State Cabinet, whose decision would certainly override the ACLR. The plaintiffs had only shown that they had merely applied for the state land by submitting their applications and by the payment of the registration fees and this did not grant them any interest over the State land that they had applied under the Land Ordinance (see paras 19 & 21–22).

- (6) From the evidence there was no proof of the alleged loss of income. There was also absolutely no evidence to prove aggravated damages as prayed. Neither were there any facts leading to aggravated damages being pleaded in the body of the statement of claim. From the totality of the evidence, the plaintiffs had not proved the damages and the aggravated damages as they had claimed. Even if the plaintiffs were able to prove the contravention of their rights, only nominal damages may be awarded. Without the plaintiffs' right or interest over the disputed land being established or that the plaintiffs were in lawful possession of the disputed land, the plaintiffs would not be entitled to claim damages against the defendant (see para 27).

[Bahasa Malaysia summary]

Plaintif-plaintif mengatakan bahawa mereka anak watan dan keturunan kaum asli Rungus di Sabah dan pada setiap masa matan penduduk, pemohon dan/atau penuntut sah hak-hak adat anak watan ('HHA AW') tanah kerajaan dalam kawasan Kg Rukom Ulu dalam Daerah Pitas, Sabah untuk kawasan seluas lebih kurang 100 ekar ('tanah yang dipertikaikan'). Selanjutnya, plaintiff mengatakan bahawa mereka telah menetap atas tanah yang dipertikaikan itu sejak tahun 1970an dan telah menanam pokok kelapa sawit atas tanah itu dengan pengetahuan dan persetujuan Jabatan Tanah dan Ukur, Pitas. Sekitar bulan September 2003, plaintiff-plaintif telah mengemukakan permohonan-permohonan mereka untuk tanah kerajaan dan membayar fi pendaftaran. Oleh kerana mereka telah menetap dan bercucuk tanam secara berterusan atas tanah yang dipertikaikan itu lebih daripada tiga tahun, plaintiff-plaintif mendakwa mereka mempunyai HHA AW menurut ss 65, 66 dan 67(2) Ordinan Tanah Sabah (Cap 68), ('Ordinan Tanah tersebut'). Plaintiff-plaintif berhujah bahawa defendan telah mencero boh dengan salah ke atas tanah yang dipertikaikan dan menyebabkan kerosakan serta memusnahkan pokok-pokok getah dan kelapa sawit mereka sehingga menyebabkan mereka tidak dapat menggunakan dan menikmati tanah yang dipertikaikan tersebut. Justeru, plaintiff-plaintif memohon daripada mahkamah ini, antara lain, deklarasi bahawa mereka telah memperoleh HHA AW menurut ss 65, 66 dan 67(2) Ordinan Tanah tersebut dan bahawa mereka tidak terjejas oleh mana-mana pemerolehan, keluaran dan pendaftaran hak milik kepada pemohon-pemohon lain terhadap tanah yang dipertikaikan tersebut, satu injunksi untuk menghalang defendan daripada mencero boh tanah yang dipertikaikan dan ganti rugi. Defendan menegaskan bahawa tanah

- A yang diberikan kepada mereka untuk penanaman pokok-pokok getah ('tanah tersebut') termasuklah tanah yang dipertikaikan yang masih diwartakan sebagai hutan simpan atas nama Pihak Berkuasa Pembangunan Perhutanan Sabah ('PBPPS') pada tahun 2003 dan 2004 dan bukan untuk pemerolehan pada masa matan. Defendan menafikan bahawa plaintif-plaintif telah
- B membuktikan tuntutan-tuntutan HHAAW mereka di bawah Ordinan Tanah tersebut atau secara alternatif defendan mempli bahawa plaintif-plaintif tiada kausa tindakan terhadap defendan di Mahkamah Tinggi kerana Mahkamah Tinggi tidak mempunyai bidang kuasa asal ke atas tuntutan HHAAW
- C plaintif-plaintif di bawah Ordinan Tanah tersebut. Isu-isu berikut telah ditimbulkan untuk ditentukan oleh mahkamah ini iaitu: (a) sama ada plaintif-plaintif menduduki atas tanah yang dipertikaikan tersebut dengan sah; (b) sama ada kemasukan defendan ke atas tanah yang dipertikaikan itu adalah sah; (c) sama ada pembangunan, kerja-kerja dan penanaman pokok-pokok getah yang dijalankan oleh defendan atas tanah yang dipertikaikan tersebut
- D adalah sah; dan (d) sama ada plaintif-plaintif berhak untuk menuntut ganti rugi terhadap defendan kerana kerugian atau kemusnahan pokok-pokok kelapa sawit yang ditanam oleh plaintif-plaintif atas tanah yang dipertikaikan tersebut dan ganti rugi lain terhadap tanah yang dipertikaikan tersebut akibat daripada pembangunan, kerja-kerja dan penanaman pokok-pokok getah yang dijalankan oleh defendan atas tanah yang dipertikaikan tersebut.
- E

Diputuskan,menolak tuntutan plaintif-plaintif dengan kos sebanyak RM8,000:

- F (1) Adalah tidak berbelah bahagi lagi bahawa tiada keterangan menunjukkan bahawa plainti-plaintif telah mengemukakan tuntutan HHAAW mereka di bawah s 14 atau pegangan adat di bawah s 81 Ordinan Tanah tersebut kepada Penolong Pemungut Hasil Tanah ('PPHT') untuk penentuan di bawah ss 14 atau 81 Ordinan Tanah tersebut dan keputusan di bawah ss 16 atau 82 dan 83 Ordinan Tanah tersebut. Oleh
- G kerana Ordinan Tanah tersebut telah memperuntukkan peruntukan spesifik yang memberikan kuasa kepada PPHT untuk menentukan dan/atau memutuskan HHAAW atau pegangan adat ke atas tanah kerajaan negeri, plaintif-plaintif tidak dibenarkan mengelak
- H peruntukan-peruntukan Ordinan Tanah tersebut dan membawa ke Mahkamah Tinggi yang hanya mempunyai bidang kuasa rayuan untuk membicarakan tuntutan sedemikian. Ia juga boleh disangkal bahawa apa-apa tuntutan HHAAW perlu dikemukakan kepada PPHT dan/atau Pengarah Tanah dan Ukur dan/atau Kerajaan Negeri Sabah yang hendaklah menjadi pihak kepada writ dan mempunyai hak untuk
- I mendengar. Adalah jelas di sini bahawa ia tidak dibuat oleh pihak-pihak dalam kes ini (lihat perenggan 10).
- (2) Berdasarkan kegagalan plaintif-plaintif untuk mematuhi peruntukan-peruntukan statutori Ordinan Tanah tersebut itu sendiri,

tuntutan mereka untuk HHAAW atau pegangan adat hendaklah dibatalkan atas alasan bahawa Mahkamah Tinggi tiada bidang kuasa asal untuk menentukan atau memutuskan tuntutan sebegini sebagaimana diputuskan oleh Mahkamah Rayuan dalam kes *Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors* [2011] 1 LNS 537. Berikutan itu, dengan ketiadaan hak sedemikian untuk membuat penentuan atas tanah yang dipertikaikan maka tiada persoalan pencerobohan kerana tanah yang dipertikaikan adalah milik kerajaan negeri dan bukan plaintif-plaintif. *Quicquid plantatur solo credit solo* — semua yang ditanam atas tanah adalah milik tanah. Apa-apa tumbuh-tumbuhan atau pokok-pokok kelapa sawit yang dikatakan ditanam oleh plaintif-plaintif atas tanah yang dipertikaikan tersebut bukan milik plaintif-plaintif untuk memberi mereka hak menuntut kerugian atau ganti rugi disebabkan ke atas tanaman tersebut. Tanaman tersebut adalah milik tanah tersebut dan oleh itu milik kerajaan negeri (lihat perenggan 11).

- (3) Hanya dengan mengemukakan permohonan tanah untuk tanah kerajaan negeri tidak memberikan apa-apa hak ke atas tanah yang dipertikaikan. Fakta bahawa PPTS, Pitas tidak mempunyai bantahan terhadap kemasukan plaintif-plaintif ke atas tanah yang dipertikaikan sebagaimana dikatakan tetapi dengan risiko dan tanggungjawab yang ditanggung sendiri oleh plaintif-plaintif, hanya menunjukkan bahawa kemasukan mereka tidak boleh diberikan dari segi undang-undang dan bahawa kenapa ia bersyarat dan tidak mutlak. Tiada keterangan atau penegasan oleh plaintif-plaintif bahawa mereka tidak menyedari yang mereka perlu menanggung risiko sedemikian. Oleh itu, inferens munasabah boleh dibuat bahawa plaintif-plaintif mesti sedar tentang risiko memasuki milikan tanah yang dipertikaikan itu dan jika memang telah dimasuki oleh mereka, sebagaimana dinyatakan oleh PW3 maka ia tidak boleh dianggap bahawa mereka mempunyai hak milikan tersebut. Justeru, plaintif-plaintif tidak boleh menduduki dengan sah atas tanah yang dipertikaikan tersebut berdasarkan persetujuan atau kelulusan yang dikatakan melalui surat daripada PPHT tersebut (lihat perenggan 16).
- (4) Kemasukan defendan-defendan ke atas tanah yang dipertikaikan tersebut adalah berasaskan surat daripada setiausaha tetap Kementerian Pertanian dan Industri Makanan yang mana defendan berhujah adalah keterangan jelas bahawa kebenaran telah diberikan oleh kerajaan negeri kepada defendan untuk memasuki tanah tersebut. Berikutan surat ini Kabinet Kerajaan Negeri Sabah telah bersetuju untuk meluluskan lebih kurang 10,000 hektar tanah di Semenanjung Bengkoka, Daerah Pitas kepada defendan untuk projek pembasmian kemiskinannya di mana kira-kira 14,460 hektar tanah hutan simpan *diwartakan* semula melalui Pemberitahuan Warta bertarikh Mac 2004 untuk tanah tersebut diberikan kepada defendan untuk projeknya berikutan kebenaran yang diberikan oleh Jabatan Tanah dan Ukur untuk juruukur defendan

A

B

C

D

E

F

G

H

I

- A mengukur tanah yang diawardkan kepada defendan. Kesemua tindakan tersebut menunjukkan tanpa ragu-ragu bahawa tanah tersebut termasuklah tanah yang dipertikaikan adalah bertujuan untuk diberikan kepada defendan bagi tujuan yang dinyatakan. Dalam ketiadaan apa-apa keterangan bantahan atau keterangan yang bertentangan, kemasukan
- B defendan ke atas tanah tersebut adalah dengan kebenaran daripada Kerajaan Negeri Sabah melalui Kementerian Pertanian dan Industri Makanan (lihat perenggan 18).
- (5) Berikutan ini, pembangunan, kerja-kerja dan penanaman pokok-pokok
- C getah yang dijalankan oleh defendan atas tanah tersebut tanpa ragu-ragu adalah sah kerana kelulusan telah diberikan kepada mereka oleh Kabinet Kerajaan Negeri, yang mana keputusan itu pasti mengatasi PPHT. Plaintiff-plaintiff hanya menunjukkan bahawa mereka hanya memohon untuk tanah kerajaan dengan mengemukakan permohonan mereka dan
- D melalui bayaran fi pendaftaran dan ini tidak memberikan mereka apa-apa kepentingan ke atas tanah kerajaan negeri yang telah dipohon oleh mereka di bawah Ordinan Tanah tersebut (lihat perenggan 19 & 21–22).
- (6) Berdasarkan keterangan tiada bukti berhubung kerugian pendapatan seperti yang dikatakan. Juga tiada keterangan langsung untuk
- E membuktikan ganti rugi tambahan sepertimana dipohon. Tiada juga apa-apa fakta menunjukkan ganti rugi tambahan telah dipli dalam penyataan tuntutan. Berdasarkan keseluruhan keterangan, plaintiff-plaintiff tidak membuktikan ganti rugi dan ganti rugi tambahan sebagaimana yang telah dituntut oleh mereka. Walaupun plaintiff-plaintiff
- F dapat membuktikan pelanggaran hak-hak mereka, hanya ganti rugi biasa boleh diawardkan. Tanpa hak atau kepentingan plaintiff-plaintiff ke atas tanah yang dipertikaikan tersebut atau bahawa plaintiff-plaintiff mempunyai milikan sah ke atas tanah yang dipertikaikan tersebut, plaintiff-plaintiff tidak mempunyai hak untuk menuntut ganti rugi
- G terhadap defendan (lihat perenggan 27).]

Notes

For cases on claim of customary land, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3205–3210.

- H For cases on High Court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5269–5346.

Cases referred to

Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)

- I *Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors* [2011] 1 LNS 537, CA (refd)

Lim Fong Tsin & 23 Ors v The Assistant Collector of Lands & 2 Ors [1997] 1 LNS 7, HC (refd)

Ng Thau Shing v George Justin & Other cases [2005] 6 CLJ 80, HC (refd)

- Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30, FC (refd) A
- Nik Ibrahim Bin Abdul Rahman v Pentadbir Tanah Jajahan Gua Musang & Ors* [2001] 5 MLJ 59, HC (refd)
- Noh bin Abdul Aziz & Anor v Director of Lands and Surveys Kota Kinabalu & Anor* [1999] 6 MLJ 772, HC (refd)
- Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, HC (refd) B
- Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31, CA (refd)
- Tan Sri Khoo Teok Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd) C

Legislation referred to

Sabah Land Ordinance (Cap 68) ss 13, 14, 15, 16, 41, 65, 66, 67(2), 69, 81, 82, 83

- Gilbert Bulagang (Bulagang & Co) for the the plaintiffs.* D
- Saiful Azian Moktar (Jayasuriya Kah & Co) for the the defendant.*

Chew Soo Ho J:

THE BRIEF FACTS E

[1] The plaintiffs alleged they are the natives and the descendants of the indigenous Rungus people in Sabah and are at all material times the lawful occupiers, the applicants and/or the claimants of native customary rights ('NCR') of the state land in the locality of Kg Rukom Ulu in the District of Pitas, Sabah of an area of 100 acres more or less ('the disputed lands'). The plaintiffs also alleged that they have been in occupation of the disputed lands since 1970 and have cultivated oil palm trees thereon with the knowledge and consent of the Lands and Surveys Department, Pitas. F G

[2] Sometimes on 10 September 2003, the plaintiffs had respectively submitted their applications for state land and had paid the registration fee on 15 March 2004. Since they were allegedly in continuous occupation and cultivation of the disputed land for more than three years, The plaintiffs claimed that they have the NCR by virtue of ss 65–66 and 67(2) of the Land Ordinance (Sabah Cap 68), ('the Land Ordinance'). H

[3] On or about 16 April 2008, the defendant was alleged to have wrongfully trespassed onto the disputed land and caused damage and destruction to the rubber trees and oil palm trees planted by the the plaintiffs thereby depriving them of the use and enjoyment of the disputed land. Therefore, the plaintiffs pray for, inter alia, declarations that they have acquired NCR pursuant to ss 65–66 and 67(2) of the Land Ordinance and that they are not affected by any I

- A** purported alienation, issuance and registration of titles to other applicants of the disputed land, an injunction to restrain the defendant, their servants or agents from trespassing or continuing to trespass, damages, aggravated damages, interest and costs.
- B** [4] The defendant averred that the land granted to them for rubber trees cultivation ('the said land') inclusive of the disputed land was still gazetted as a forest reserve in favour of Sabah Forest Development Authority ('SAFODA') in 2003–2004 and was not available for alienation at the material time. The defendant denied that the plaintiffs have established their claims of NCR
- C** under the Land Ordinance or alternatively the defendant pleaded that the the plaintiffs have no cause of action against the defendant in the High Court as the High Court does not have the original jurisdiction over the plaintiffs' claim of NCR under the Land Ordinance. It was further averred that when the defendant first entered the said land sometimes in or around 2006, there was
- D** no one occupying the said land nor was there any oil palm cultivated on the said land which was still jungle land without access road or basic infrastructure. The defendant denied any trespass but averred that they entered the said land with the expressed consent and/or permission from the relevant government authorities and hence it was lawful.
- E**

THE ISSUES

[5] The agreed issues for trial (bundle F) between the parties herein are:

- F** (a) whether the plaintiffs were in lawful occupation of the disputed land;
- (b) whether the defendant's entry into the land inclusive the disputed land is lawful;
- G** (c) whether the development, works and planting of rubber trees carried out by the defendant in the disputed land is lawful; and
- (d) whether the plaintiffs are entitled to claim damages against the defendant for the loss of or destruction to the oil palm trees planted by the plaintiffs in the disputed land and other damage to the disputed land as a result of
- H** the development, works and the planting of rubber trees carried out by the defendant in the disputed land.

- I** [6] In addition to these four issues, the defendant has in its submission raised two preliminary issues, namely, that the plaintiffs had failed to prove the disputed land and secondly the credibility of the witnesses. I nevertheless do not find these preliminary issues necessitate separate consideration but will consider them within the four issues when they are being deliberated. There is also a legal issue on the jurisdiction of the High Court under the Land Ordinance which had been pleaded which I shall consider.

THE EVALUATIONS AND FINDINGS

Jurisdiction of the High Court on NCR claims under the Land Ordinance

[7] Before deliberating on the four issues, a pleaded legal issue raised by the defendant as to the original jurisdiction of this court to determine the plaintiffs' NCR claim need to be considered since this is a legal question which will affect the fundamental claim of the plaintiff.

[8] The plaintiffs' principal claim as in prayers (1)–(3) in the amended statement of claim shows that the plaintiffs are seeking declarations premised on their claims of NCR, inter alia. For ease of reference, the three relevant prayers are reproduced below:

- (1) A declaration that by virtue of sections 65, 66 and 67(2) of the Land Ordinance (Sabah Cap 68) the Plaintiffs have acquired native customary rights by customary tenure and/or is a holder of customary tenure of the said land conferring upon the Plaintiffs a permanent heritage and transferable right of use and occupancy in the said land;
- (2) A declaration that the Plaintiffs are also the holder of the said land under customary tenure without documentary title and entitled to exercise native customary right and/or customary tenure in and over the said land with or without documentary title to the said land;
- (3) A declaration that the Plaintiffs' right, title and interest in and to the said land are not affected by the purported approval, alienation, issuance and registration of titles to other applicant or applicants of the said land.

[9] From prayers (1)–(2) above, it is undoubted that the plaintiffs are seeking this court to determine and declare that they have the NCR (s 15 of the Land Ordinance) and/or customary tenure (s 65 of the Land Ordinance) and are thus entitled to exercise that NCR to have customary tenure of the disputed land and by prayer (3), they seek to claim their rights, title and interest in the disputed land to supersede or override any approval, alienation, issuance and registration of titles to any other applicants. Does this court have the original jurisdiction to determine the claim of NCR by the plaintiffs? In *Darinsok Pangiran Apan & Ors v Hap Seng Consolidated Bhd & Ors* [2011] 1 LNS 537 where the question for determination by the Court of Appeal is that 'upon a true construction of ss 13–16, 41 and 69, does the High Court have the original jurisdiction to hear and determine the plaintiffs' NCR claim?' The Court of Appeal held, inter alia, as follows:

[14] It is abundantly clear to us that the High Court does not have any original jurisdiction to hear the plaintiffs' NCR claim. Specifically, under s 14, the plaintiffs' NCR claim has to be decided in the first instance by the ACLR. Thereafter, if the

- A plaintiffs are dissatisfied with the ACLR's decision, the plaintiffs may invoke the first limb of s 41(1) to appeal to the director. The plaintiffs may thereafter bring their appeal (relating to their NCR claim) to the High Court under the second limb of s 41(1). The plaintiffs do not have the right to commence their NCR claim in the High Court in order to urge the High Court to exercise its original jurisdiction. In
- B other words, they may only proceed by way of appeal to the High Court and seek the court's assistance via appellate jurisdiction ...

- [10] From the evidence before this court, it is unequivocal that there is no
- C evidence to show that the plaintiffs have put up their NCR claim under s 14 or customary tenure under s 81 of the Land Ordinance to the ACLR or that the ACLR had considered and decided on such claim against them. What the plaintiffs have contended is that they have applied for the disputed land and have paid the registration fee of RM5 for their respective applications. But
- D nowhere did they say that they have forwarded their NCR claim or customary tenure claim to the ACLR for determination under ss 14 or 81 of the Land Ordinance and decision under ss 16 or 82 and 83 of the Land Ordinance. Since the Land Ordinance has provided specific provisions vesting in the ACLR the authority to determine and/or decide the NCR or customary tenure claim over
- E state land, the the plaintiffs are not permitted to circumvent the provisions of the Land Ordinance to come to the High Court which has only the appellate jurisdiction to ventilate such claim. It is also axiomatic that any NCR claim has to be directed to the ACLR and/or the director of lands and surveys and/or the Government of the State of Sabah who must be made a party to the writ and be
- F entitled to be heard; see *Ng Thau Shing v George Justin & Other cases* [2005] 6 CLJ 80. It is apparent here that they are not made the parties herein.

- [11] On the failure of the plaintiffs to comply with these statutory provisions
- G of the Land Ordinance alone, their claim for NCR or customary tenure before this court must be struck out on ground that the High Court has no original jurisdiction to determine or decide on such claim as decided by the Court of Appeal in *Darinsok's* case and hence this court being bound by the Court of Appeal's decision is unable to grant any declaration pertaining to such claims.
- H Consequently, in the absence of such right being determined over the disputed land, there cannot be any question of trespass as the disputed land belongs to the State and not the plaintiffs. *Quicquid plantatur solo credit solo* — everything planted in the soil belongs to the soil; see *Nik Ibrahim Bin Abdul Rahman v Pentadbir Tanah Jajahan Gua Musang & Ors* [2001] 5 MLJ 59 at p 63. Any
- I vegetation or oil palm trees allegedly planted by the plaintiffs on the disputed land would not belong to the plaintiffs to entitle them to claim loss or damage caused to those plants. They belong to the land which is state land and thus to the state. The plaintiffs must therefore fail in their claim against the defendant. On this ground of jurisdiction alone, the plaintiffs' claim ought to be dismissed

with costs.

A

Location of the disputed land

[12] The disputed land is located in Kg Rukom Ulu as evidenced by the plaintiffs. However, the plaintiffs have not shown vide any survey plans or maps of the actual location of the disputed land as claimed by them. The defendant has denied categorically the plaintiffs' pleaded fact that they were 'the lawful occupiers, applicants, holder of customary tenure and/or claimants of NCR of the State land measuring 100 acres more or less in the locality of Kg Rukom Ulu in the District of Pitas, Sabah' and has put the plaintiffs to strict proof thereof. It is thus incumbent upon the plaintiffs to also prove the location of the disputed land in the locality of Kg Rukom Ulu, Pitas as the defendant had through DW1, a survey technician from Jurukur Ong & Rakan-Rakan who had carried out the survey of the land and the area claimed by the locals, had produced the survey plan (bundle B, p 19) wherein DW1 concluded that the area known as Zone I and II of Block 26 as shown in the said survey plan was not cultivated at the time of the survey in the middle of 2005 as it was still jungle land then. In cross-examination, DW1 confirmed that the area between Zone I and II of Block 26 and the trunk road were excluded from his survey because of the cultivation by the *kampung* people. There was no challenge as to the survey plan and his evidence of no cultivation between Zone I and II of Block 26 nor that those were the area or location of the plaintiffs' alleged disputed land. A failure to cross-examine a material aspect of the evidence of the opponent's witness tantamounts to an acceptance of that evidence: see *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 (CA). Hence the land surveyed by DW1 is the only evidence of the location of the land for which the defendant was awarded the right to occupy and cultivate rubber trees and that there was no cultivation of oil palm within the said land as the area allegedly planted by the Kampung people between the two zones and the trunk road were not included in the defendant's land for cultivation. With these evidence and in the absence of any other survey plan from the plaintiffs, their assertion that the disputed land is located at Kg Rukom Ulu without identifying the location does not suffice to prove their claim of the 100 acres more or less of the disputed land that they had allegedly cultivated with the oil palm trees. If it is true that the plaintiffs' 100 acres of land was cultivated with oil palm, I find no reason how DW1 could have missed such a vast piece of land with cultivation. I do not find any valid ground to disbelieve DW1 or doubt his credibility as he was merely performing his duty as instructed by his surveyor to carry out the physical survey and prepare the survey plan; his evidence is straight forward.

B

C

D

E

F

G

H

I

[13] Although the plaintiffs did not lead any evidence to prove the actual location of the disputed land, does that prejudice the defendant as to be unable

- A to defend its case? I would refer to the evidence of DW2 who is the defendant's assistant agriculture officer. He said in his witness statement (exh D7) at Qs & As 3–6 that the disputed land claimed by the plaintiffs is situated inside the 'Projek Khas Penanaman Getah di Semenanjung Bengkoka, Pitas' which is the poverty eradication project of the defendant and the disputed land is identified
- B in the location plan (bundle C at p 4) of the defendant as Phase 5A. In other words, the defendant knew and was able to identify the location of the disputed land which the plaintiffs have never objected to. That being the fact, there is no prejudice caused to the defendant despite the fact, as this court has found, that the plaintiff had led no evidence to prove the location of the disputed land since
- C the defendant was fully aware as to the location where the disputed land was. The defendant's contention is, thus, of no consequence when no substantial prejudice has occasioned against them. The plaintiffs, on the other hand, cannot deny the disputed land to have been located as identified in the defendant's survey plan which the plaintiffs had not objected to.
- D

THE FIRST ISSUE

- [14] Reverting back to the first issue, without the plaintiffs' claim of NCR
- E being referred to and determined by the ACLR, the mere fact that the plaintiffs have made their respective land applications with registration fees being paid does not signify that they have been alienated with the disputed land or are being conferred any right or interest on the disputed land. Both the plaintiffs stated that their respective land applications were only submitted to the land
- F office on the 15 March 2004 (bundle B pp 17–18). Evidence of DW2 shows that on 23 June 2004, the Sabah State Cabinet had agreed to approve about 10,000 hectares of land situated at Semenanjung Bengkoka, District of Pitas to the defendant for planting rubber trees under a poverty eradication project ('the defendant's project'). The decision of the Cabinet is contained in the letter
- G of the Permanent Secretary of the Ministry of Agriculture and Food Industry dated 1 July 2004 (bundle C pp 1–3). By 1 March 2005, approximately 14,460 hectares of Sabah Forest Development Authority (SAFODA's) forest reserved lands were *degazetted* vide Gazette Notification No 200 (bundle D p 90) and were given to the defendant for the defendant's project. The defendant had
- H submitted formal applications for the land for its project and was issued with permission to survey on 10 October 2008 (bundle C pp 36–38). According to DW2 who had personal knowledge of the land for the defendant's project including the disputed land as he was the senior assistant agriculture officer tasked with the role of inspecting all the defendant's project, he had first visited
- I the site where the said project land and the disputed land was in early 2005 and such visit was on an average of once a month. He found the area claimed by the plaintiffs, namely, Block 26 Zone I and Zone II in Phase 5A (as shown in the survey plan, bundle B p 19) was still secondary jungle in the year 2005. DW2 said that they could only enter that area as the old logging roads were not

accessible. They could only enter after the defendant's contractor had started to construct the road. From his personal knowledge, DW2 was able to say that there were no crops or fruits trees or oil palm in the area of the disputed land since 2005. There were also no occupiers, no permanent structure or timber house or 'sulap' on the disputed land. In short, DW2's evidence showed that as early as 2005, there were no occupiers and human cultivation on the disputed land. On the plaintiffs' claim that they had the consent or approval from the ACLR, Pitas to enter the disputed land, DW2 stated that the ACLR, Pitas vide letter dated 23 November 2004 merely stated that the land office had no objection but it did not specify which area of the lands.

[15] PW3, Nahalan bin Hj Mehdunah who was the ACLR, Pitas at the material time vide his witness statement (exh P3), testified that the Land Office of Pitas vide its letter dated 23 November 2004 had no objection to the applicant entering the land, planting of the oil palm or development of the land in order to help him to improve his livelihood but added to say that the risk was the applicant's own responsibility (exh P3, Q&A 7).

[16] From the facts of the case, the 14,460 hectares of the Sabah Forest Development Authority (SAFODA's) forest reserved land inclusive the disputed land given to the defendant for the aforesaid project, were forest reserved land until degazetted vide Gazette Notification No 200 from 1 March 2005. Prior to this date, there could not have been any alienation of the said land or any part thereof to anyone by the fact that it was a forest reserved land under SAFODA. Being a forest reserved land, it could not be conceivable for anyone to be able to clear and/or cultivate on such land nor in occupation thereon. This could probably be the risk that the plaintiffs were said to have to shoulder as stated by PW3. To reiterate, the mere submission of a land application for state land does not confer any right and interest or for that matter anything on the applicant under the Land Ordinance (see *Lim Fong Tsin & 23 Ors v The Assistant Collector of Lands & 2 Ors* [1997] 1 LNS 7; *Noh Bin Abdul Aziz & Anor v Director of Lands and Surveys Kota Kinabalu & Anor* [1999] 6 MLJ 772). This is perhaps another risk that plaintiffs have to face when they entered the disputed land and were purportedly cultivating on the land at their own risks as the land after being degazetted could have been alienated or given to any other parties. The fact of the ACLR, Pitas having no objection to the plaintiffs' entry into the disputed land as alleged but with the risk and responsibility that the plaintiffs would have to bear themselves, only indicate that their entry could not be lawfully granted and that was why it was qualified and not absolute. This is the evidence adduced in the plaintiffs' case through PW3. There is no evidence or any averment that the plaintiffs were unaware that they were to bear such risks. Therefore, the reasonable inference that can be drawn is that the plaintiffs must have been well aware of such risks to enter into possession of the disputed land and if indeed they had entered

A into, as stated expressly by PW3, that cannot be construed to be that they have the right of possession thereof. It was purely to assist the deceased father of the plaintiffs to improve his living which can only be reckoned as compassionate ground but not a legal right.

B [17] From the evidence as a whole and on a balance of probabilities, I find that the plaintiffs could not be in lawful occupation of the disputed land relying on the alleged consent or approval vide the letter from the ACLR dated 23 November 2004.

C THE SECOND ISSUE

D [18] On the second issue, the defendant's entry into the land inclusive the disputed land was premised on the letter dated 1 July 2004 from the Permanent Secretary of the Ministry of Agriculture and Food Industry (bundle C pp 1–3) which the defendant submitted to be clear evidence that permission had been granted by the state government to the defendant to enter the land. Flowing from this letter which was subsequent to the decision of the Cabinet of the State Government of Sabah made on 23 June 2004 agreeing to approve approximately 10,000 hectares of land at Semenanjung Bengkoka, District of Pitas to the defendant for its said poverty eradication project, approximately 14,460 hectares of the aforesaid forest reserved land were *degazetted* vide gazette notification dated 1 March 2004 (bundle D p 87) for the land to be given to the defendant for its said project following which permissions were given by the Lands and Surveys Department vide letter dated 10 October 2008 (bundle C pp 36–38) for the defendant's surveyor to survey the land awarded to the defendant. All these actions indicate unequivocally that the land including the disputed land was intended to be given to the defendant for the stated purpose. In the absence of any rebuttal evidence or evidence to the contrary, I agree with the submission by the defendant that the defendant's entry into the said land was with the permission from the Sabah State Government through the Ministry of Agriculture and Food Industry and hence it must be construed as lawful.

H THE THIRD ISSUE

I [19] Consequent upon the finding on the second issue above, the third issue becomes obvious that the development, works and the planting of the rubber trees carried out by the defendant in the land must be held to be lawful.

[20] The first plaintiff gave evidence that the whole of the 100 acres of the disputed land was planted with oil palm trees since 2004 and before 2004, the whole 100 acres which her father and she applied was planted with paddy, vegetables and fruit trees with the help of the other people whom she had

helped to plant their lands. To this court, a 100 acres of land is a big plot of land and if it was cultivated with cultivation within the forest land, I find it to be improbable that it is unnoticeable or it is not seen or detected as testified by the defence witnesses. In addition, to plant an area of 100 acres would certainly require a lot of manpower and/or machinery and costs. The first plaintiff's evidence is that the other people helped to plant the paddy, vegetables and fruit trees purportedly as a return of favour for her assistance to plant their lands. To this court, her evidence in this respect is a mere bare assertion as there is no evidence in support. This court finds it improbable to accept the first plaintiff's evidence when she led not an iota of evidence as to who cleared the 100 acres of the forest land and its costs, the purchase of any seedlings, the labour required, the respective costs, the harvest, the profits or loss etc which gives rise to grave doubt as to her evidence.

[21] The defendant had also submitted on the credibility of the first plaintiff particularly when she testified that the house erected by her late father on the disputed land where she lived since birth was allegedly destroyed or demolished by the defendant which was nevertheless directly negated by the evidence of the second plaintiff who gave evidence that their late father's house in which they lived since birth or childhood is still on the said land. There was no attempt by the plaintiffs to erase this material contradiction between the evidence of both of them which renders the first plaintiff's credibility doubtful. If the plaintiffs' late father's house is still on the disputed land, it would not be probable that the defendant could have trespassed into the disputed land to destroy allegedly all the oil palm trees of the plaintiffs but leaving the house untouched behind when it was no longer occupied as stated by the second plaintiff in evidence. Evidence of the second plaintiff indicates that the reason for his late father to take this action against the defendant is because the defendant had entered the state land that his late father had applied and destroyed the oil palm planted. In other words, the basis for the entry into the disputed land is solely on the ground that an application for state land had been submitted or applied for. Since the mere application for state land does not confer anything on the applicant under the Land Ordinance and that everything planted in the soil belongs to the soil, this ground is clearly unsustainable. Hence, even if PW5 had allegedly planted the oil palm trees for the plaintiffs, the same would apply as the plaintiffs had only shown that they had merely applied for the state land by submitting their applications and by the payment of the registration fees which does not grant them any interest over the state land that they had applied under the Land Ordinance.

[22] The position of the defendant as deliberated above is different and is undoubtedly lawful when they carried out works, planting of rubber trees and/or development of the land approved to be given to them by the State

- A Cabinet whose decision would certainly override the ACLR.

THE FOURTH ISSUE

- B [23] On the final issue of damages, when the plaintiffs are unable to establish their rights and/or interest to the land claimed, there is no question of damages. It is thus only academic to discuss on this issue of damages. However, for completeness, I would say the following relating to damages.

- C [24] The plaintiffs vide their amended statement of claim had pleaded that they had incurred expenditure in excess of RM250,000 in the development of the said land and the planting of about 2,000 oil palm trees and they also claimed loss of income from the said land from 16 April 2008 to the date of trial (see para 12 at bundle A p 4). In addition to damages, the plaintiffs also
- D prayed for aggravated damages in their prayer (6) therein (bundle A p 5).

- E [25] It is trite that damages must be proved, see *Tan Sri Khoo Teok Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 (FC); *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 (CA). In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 as cited in *Tan Sri Khoo Teck Puat's* case, the court stated at p 367 as follows:

- F It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right

- G [26] To purportedly prove damages, the plaintiffs had called PW5 Matujal bin Timbuang who gave his occupation as a farmer or a businessman. He testified vide his witness statement (exh P5) Q&A 8 as to the cost of oil palm seedlings, cost of planting, transportation cost for oil palm seedlings, cost for making terrace on the land, cost for clearing the land and maintenance cost and vide Q&A 9, he said 'Based on the costs of cultivating oil palm on the land, I believe the loss would be more than RM250,000.00 ...' and added that there
- H was loss of income from the cultivation of the oil palm which had been destroyed twice when they were between two to three years old and would bear fruits in about two years time. It must first be noted the PW5 is not called as an expert witness. His evidence must therefore derive from facts and not opinions. Ironically, apart from his mere statement of the amount of costs which the
- I defendant had challenged in cross-examination, PW5 did not produce any supporting documents for his 'believe the loss would be more than RM250,000.00'. The plaintiffs had also failed to tender any evidence such as any invoices, payment vouchers, receipts or any other documents to prove or show that such sums had been expended to the total of RM250,000 as claimed.

Hence, PW5's belief can only be construed as an opinion or speculation or estimation without the source or basis. This sum of RM250,000 as it had been so pleaded appears to be special damages. For special damages, it must not only be specifically pleaded but must be strictly proved. In *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30 (FC), His Lordship Syed Agil Barakbah FJ said at p 33:

Special damages on the other hand have to be specifically pleaded and strictly proved. They refer to past expenses and loss of earnings. The exact loss must be pleaded where the precise amount of item has become clear before the trial. The reason that special damages have to be specifically pleaded is in order to comply with its object which is to crystallise the issue and to put the defendants on their guard and tell them what they have to meet when the case comes on trial.

[27] From the evidence there is no proof of the alleged loss of income to amount to what sum. There is also absolutely no evidence to prove aggravated damages as prayed for nor any facts leading to aggravated damages being pleaded in the body of the statement of claim. From the totality of the evidence, I am not satisfied that the plaintiffs had proved the damages and the aggravated damages as they have claimed. As held in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* even if the plaintiffs are able to prove the contravention of their rights, only nominal damages may be awarded. In so far as the defendant is concerned, I find that the plaintiffs had failed to prove a contravention of their rights against the defendant for nominal damages to be awarded. Without the plaintiffs' right or interest over the disputed land being established or that the plaintiffs were in lawful possession of the disputed land, the plaintiffs would not be entitled to claim damages against the defendant.

CONCLUSION

[28] In conclusion, for the foregoing reasons, I hold that the plaintiffs have failed to prove their case against the defendant on a balance of probabilities and consequently, the plaintiffs' claim is dismissed with costs of RM8,000.

Plaintiffs' claim dismissed with costs of RM8,000.

Reported by Ashgar Ali Ali Mohamed

A

B

C

D

E

F

G

H

I